

3-21-2013

## Salladay v. Bowen Appellant's Brief Dckt. 43603

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IN THE SUPREME COURT OF THE STATE OF IDAHO

G. LANCE SALLADAY, AS PERSONAL  
REPRESENTATIVE, FOR AND ON BEHALF  
OF THE ESTATE OF ROGER JOHN  
TROUTNER,

Respondent/Plaintiff,

v.

CANYON LATERAL IRRIGATION  
DISTRICT; and

ERIC BOWEN and KATHRYN BOWEN,  
husband and wife,

Appellants/Defendants.

Supreme Court Case No. 43603-2015  
District Court No. CV 2015-102-C

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COURT OF APPEALS  
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APPELLANT'S OPENING BRIEF

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT,  
IN AND FOR THE COUNTY OF CANYON

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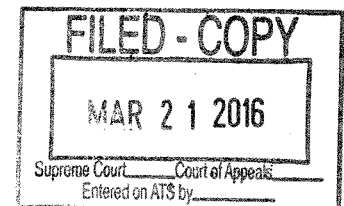
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**2. The Memorandum of Sale is void against the Bowens pursuant to Idaho Code § 55-812.**

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**c. In summary, Salladay's Memorandum of Sale is void against the Bowens pursuant to Idaho Code § 55-812.**

**B. The district court erred when it held that even if the Memorandum of Sale was not properly recorded, that CILD was required to provide notice of the pending tax-deed sale to Salladay.**

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**2. Salladay’s Memorandum of Sale may contain ambiguities that cannot be cured by reference to the instrument itself, because no such instrument was recorded.**

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## **I. STATEMENT OF THE CASE, STATEMENT OF FACTS, & PROCEDURAL HISTORY**

### **A. Statement of the case.**

This case revolves around the Bowen Appellants' [hereinafter "the Bowens"] tax deed and a document entitled Memorandum of Sale, which the Respondent, G. Lance Salladay [hereinafter "Salladay"<sup>1</sup>] alleges entitled him to receive notice of the pending issuance of the tax deed. The Bowens contend that Salladay's Memorandum of Sale was not properly recorded pursuant to statute, so Salladay was not entitled to receive notice of the pending tax deed sale. The Bowens also contend that, even if Salladay was entitled to receive notice of the sale, his petition to the district court was untimely. The Caldwell Irrigation Lateral District [hereinafter "CILD"] aligned itself with Salladay.

### **B. Statement of the facts.**

Salladay is the personal representative of the Troutner Estate. R. p. 48, L. 5 (Paragraph 1 of the Affidavit of G. Lance Salladay in Opposition to Motion to Dismiss and in Support of Motion for Summary Judgment [hereinafter "Salladay Affidavit"]). Salladay alleges that, "The estate is the owner of certain property located at 615 E. Chicago St., Caldwell, Idaho, which is the subject of this action." R. p. 48 L. 6, 7. Mr. Kelly Joe Stroud and Salladay entered into a purchase and sale transaction, although the details of that transaction are unknown. *See* R. pp. 48, 85. On February 7, 2012, Salladay recorded a document entitled Memorandum of Sale. R. p. 48 L. 9 – 12; p. 71 L. 2, 3; p. 84. The record contains no evidence that any document regarding the purchase and sale transaction between Stroud and Salladay, except for the Memorandum of Sale, was recorded. *See generally* R.

On July 14, 2014, CILD issued Operational Maintenance deeds [hereinafter "O&M deed"] to itself for properties with delinquent tax assessments for the year 2011, including the property at 615 E. Chicago Street. *See generally* R. pp. 55 – 57. On December 16, 2014, CILD accepted a bid from Eric Bowen for the previously issued O&M deed for the property at 615 E. Chicago Street. R. p. 57 L. 28 – 33; *see also* R. p. 114 L. 6 – 8. The Bowens' tax deed was

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<sup>1</sup> As the caption of this action shows, Salladay is acting in his capacity as personal representative of the Troutner Estate. All references to Salladay in this document are in his capacity as personal representative of the estate. For ease of flow and for clarity, this brief refers to the respondent estate as Salladay.

recorded on December 19, 2014. R. p. 84. CILD provided notice of the O&M deed sale to Stroud and also provided notice via newspaper publication. R. p. 114 L. 3, 4. Salladay did not receive a notice letter for the sale of the O&M deed. R. p. 114 L. 9 – 14. Salladay alleges that he was an interested party pursuant to Idaho Code § 43-717; and therefore, that he was entitled to receive notice of the pending tax deed sale because he had recorded the Memorandum of Sale. R. p. 24 L. 12 – 14, 21, 22. CILD aligned itself with Salladay in these proceedings. Tr. p. 16 L. 16 – 19, p. 27 L. 12 – p. 28 L. 13.

### **C. Procedural History.**

On January 5, 2015, Salladay filed a Petition for Reversal of Board Action and to Clear Title. R. p. 2, L. 13, p. 5. On February 6, 2015, CILD filed an Answer to Petition for Reversal of Board Action and to Clear Title. R. p. 2, L. 24, p. 13. On February 10, 2015, the Bowens, through their attorney at the time, filed an Answer to Salladay's petition<sup>2</sup>. R. p. 2 L. 29, 30, p. 13. On April 23, 2015, Salladay filed his Amended Petition for Reversal of Board Action and to Clear Title. R. p. 3 L. 13, p. 23. On April 24, 2015, the Bowens filed a Motion to Dismiss and a Brief in Support. R. p. 3 L. 14, 15, p. 34. On May 6, 2015, the Bowens filed their Amended Answer to Amended Petition for Reversal of Board Action and to Clear Title. R. p. 3, L. 20, 21, p. 34. On May 8, 2015, Salladay filed his Opposition to Defendant Bowens' Motion to Dismiss with an affidavit from Salladay in support [hereinafter "Salladay Affidavit"]. R. p. 3 L. 22 – 24, p. 38, 48. On May 12, 2015, the Bowens filed their Brief in Reply to Plaintiff's Opposition to Defendant Bowens' Motion to Dismiss. R. p. 3 L. 25, 26, p. 61. On May 13, 2015, the Bowens filed an Objection and Motion to Strike. R. p. 3, L. 27, p. 69. The Objection and Motion to Strike sought to strike Paragraph six (6) of the Salladay Affidavit and to strike Exhibit one (1) to the affidavit for reasons based upon inadmissible hearsay and violation of I.R.E. 408, statements made in compromise negotiations. *See* R. p. 69. After a hearing was held on May 14, 2015, the district court issued its opinion in its Order to Remand to Board for Determination of Validity of Tax Deed, entered May 26, 2015. R. p. 3, L. 28 – 35, p. 71. The court's opinion neither ruled on nor discussed the objection and motion to strike that were argued at the May 14, 2015 hearing. *See generally* R. pp. 71 – 80.

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<sup>2</sup> The Bowens' answer was filed in the name Canyon Property Management, LLC, which was the entity that Salladay's original petition sued. Salladay later amended the petition and replaced the LLC with Eric and Kathryn Bowen.



On June 9, 2015, the Bowens filed a Motion for Reconsideration with an affidavit and brief in support. R. p. 3 L. 41 – 44, pp. 83 – 94. On June 25, 2015, Salladay filed a Memorandum in Opposition to the Bowen Defendants’ Motion for Reconsideration. R. p. 4 L. 13, 14, p. 95. On July 22, 2015, the Bowens filed their Brief in Reply to Plaintiff’s Opposition to the Bowen Defendants’ Motion for Reconsideration. R. p. 4 L. 20, 21, p. 103. The district court took the case under advisement after holding a hearing on the motion for reconsideration on July 24, 2015. R. p. 4. L. 22 – 25. On August 4, 2015, the district court issued a written decision via its Order Denying Motion for Reconsideration. R. p. 4. L. 29, p. 113. On September 15, 2015, the Bowens filed their Notice of Appeal to the Idaho Supreme Court. R. p. 4 L. 30 – 37, p. 125.

## **II. ISSUES PRESENTED ON APPEAL**

- A. Whether the district court erred when it held that Salladay’s Memorandum of Sale was properly acknowledged and properly recorded?
- B. Whether the district court erred when it held that CILD had constructive notice pursuant to Idaho Code § 55-811 that Salladay was either an owner or party of interest?
- C. Whether the district court erred when it held that even if the Memorandum of Sale was not properly recorded, that CILD was required to provide notice to Salladay?
- D. Whether the district court erred when it held that CILD had constructive notice pursuant to Idaho Code § 55-811 that Salladay was either an owner or party of interest?
- E. Whether the district court erred when it held that the Bowens did not rebut or challenge the Memorandum of Sale pursuant to Idaho Code § 55-707?
- F. Whether the district court erred when it held that evidence to rebut the presumption that the notary acted in compliance with the Idaho Code § 55-707 was absent?
- G. Whether the district court erred when it remanded the case to the CILD Board?
- H. Whether the district court erred when it held that the CILD Board had authority to find facts and determine the validity of the tax deed after it was already issued?
- I. Whether the district court erred when it found that Appellants/Defendants obtained a windfall and that CILD conceded such?
- J. Should the Bowens be awarded attorney’s fees and costs for this appeal?

### **III. ARGUMENT**

**A. The District Court erred when it held that the Memorandum of Sale was properly recorded.**

- 1. The Memorandum of Sale does not contain a certificate of acknowledgment as required by Idaho law; and therefore, it did not impart constructive notice to anyone, including CILD.**

The Memorandum of Sale fails to conform to the requirements of Idaho Code § 55-805; and therefore, the Memorandum of Sale was not “properly recorded,” as required by Idaho Code § 43-714A(6). Idaho Code § 55-805 states, in relevant part, as follows: “Before an instrument may be recorded, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it . . . or the execution must be proved and the acknowledgment or proof, certified in substantially the manner prescribed by chapter 7, title 55, Idaho Code . . .” The above-quoted law requires recording both the executed instrument itself and the acknowledgment of said instrument by the person who executed it. “The execution of an instrument and its acknowledgment are separate, independent acts.” *Little v. Bergdahl Oil Company*, 60 Idaho 662, 669, 95 P.2d 833, 836 (S. Ct. 1939).

Idaho Code § 55-709 requires that “an officer taking the acknowledgment of an instrument must endorse thereon a certificate substantially in the forms hereinafter prescribed.” Idaho Code §§ 55-710 through 55-715 provide the forms, depending upon the capacity of the parties executing the documents, that the certificates of acknowledgment must substantially comply with. The statutes require the county in which the instrument was acknowledged, the date and year of the acknowledgment, a statement that the person personally appeared before the acknowledging notary, that the person is known to the notary or has provided identification to the notary, and that the person whose name is “subscribed to the within instrument” also executed the same. Because Salladay is a fiduciary for the Troutner Estate under Idaho law (*see* Idaho Code § 15-3-703(a)), the form of the certificate is prescribed by Idaho Code § 55-713. That statute provides as follows:

The certificate of acknowledgment of an instrument which is executed by a person in his own name as trustee or as executor, administrator, guardian, sheriff, receiver or other official or representative capacity, shall be substantially in the following form:

State of Idaho, county of . . . . ., ss.

On this . . . . . day of . . . . ., in the year . . . . ., before me (here insert the name and quality of the officer) personally appeared . . . . ., known or identified to me (or proved to me on the oath of . . . . .), to be the person whose name is subscribed to the within instrument as (here insert the official or representative capacity in which the instrument is executed) and acknowledged to me that he (or they) executed the same as such (here insert again the official or representative capacity in which the instrument is executed).

In the event that the certificate of acknowledgment is defective, the “deficiency can be cured by reference to the instrument itself.” *Farm Bureau Finance Company, Inc. v. Carney*, 100 Idaho 745, 751, 605 P.2d 509, 515 (S. Ct. 1980) [hereinafter *Farm Bureau*] (citing *Pacific Coast Joint Stock Land Bank v. Security Prods. Co.*, 56 Idaho 436, 55 P.2d 716 (1936); *Northwestern & Pacific Hypotheek Bank v. Rauch*, 5 Idaho 752, 51 P. 764 (1898)). In *Farm Bureau*, a key issue on appeal was whether or not the acknowledgement and recording of a trust deed was sufficient to impart constructive notice to the respondents. *Farm Bureau* at 748, 605 P.2d at 512. In its opinion, the Idaho Supreme Court quoted Idaho Code §§ 55-805 and 55-709 before quoting Idaho Code § 55-710, the relevant statute in that case that prescribed the form for the certificate of acknowledgment. *Id.* at 749, 605 P.2d at 513.

The Memorandum of Sale does not contain an acknowledgment certificate that substantially complies with the statutory requirements. To cure the deficiencies, the instrument itself must be reviewed with the acknowledgment. Therein lies the problem for Salladay, because the Memorandum of Sale is merely a one-page document without a certificate of acknowledgment. R. p. 85. Even if Salladay alleges that the recorded document is the acknowledgment, albeit a defective one, the recorded document does not have an instrument to which it is attached. Without an instrument to cure the deficiencies in the alleged acknowledgment, it cannot be cured under Idaho Law. As a result, the Memorandum of Sale is not properly recorded. And because a party in interest, as defined by Idaho Code § 43-714A(6), must have a **properly recorded** “valid and legally binding purchase contract, mortgage or deed of trust” for the subject property, Salladay does not meet the definition of a party in interest. Thus, Salladay was not entitled to receive notice of the tax deed’s pending issuance.

The trust deed in *Farm Bureau* contained a certificate of acknowledgment that was similar enough in length and language for the Idaho Supreme Court to hold that it substantially

complied with the requirements of Idaho Code § 55-709. *See Farm Bureau* at 749 - 751, 605 P.2d at 513 - 515. In contrast to the certificate of acknowledgement at issue in *Farm Bureau*, the Memorandum of Sale in the case at bar does not contain a certificate of acknowledgment at all, but merely a notary's stamp and signature. R. p. 84. The Memorandum of Sale's lack of a certificate of acknowledgement cannot be cured by reference to the original instrument, because such an instrument, if it exists, was not recorded. "The recording of an instrument which is not entitled under the statute to be recorded cannot import constructive notice to anyone." *Harris v. Reed*, 21 Idaho 364, 370, 121 P. 780, 782 (1912). As applied to both CILD and the Bowens, Salladay's Memorandum of Sale is fatally defective, so it was not entitled to be recorded; and therefore, it did not impart constructive notice to anyone. Salladay's failure to properly execute and acknowledge an instrument to be recorded results in him not being entitled to receive notice of the tax-deed proceedings and sale; and as a result, this Court should reverse the district court and order the district court to dismiss Salladay's petition.

## **2. The Memorandum of Sale is void against the Bowens pursuant to Idaho Code § 55-812.**

Idaho Code § 55-812 states: "Every conveyance of real property other than a lease for a term not exceeding one (1) year, is void as against any **subsequent purchaser** or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." (emphasis added) "**Before an instrument may be recorded**, unless it is otherwise expressly provided, its execution must be acknowledged by the person executing it . . . or the execution must be proved and the acknowledgement or proof, certified in substantially the manner prescribed by chapter 7, title 55, Idaho Code . . . ." Idaho Code § 55-805 (emphasis added). While the district court held that the Bowens did not challenge the acknowledgement under Idaho Code § 55-707 (R. p. 120 L. 8 – 10), the Bowens' challenge of whether or not the Memorandum of Sale was properly recorded pursuant to Idaho Code § 55-805 includes, by reference, challenging the Memorandum of Sale pursuant to "chapter 7, title 55, Idaho Code . . . ." The Bowens clearly argued that the Memorandum of Sale failed to comply with Idaho Code § 55-805. R. p. 104 L. 4 – p. 109 L. 2. Thus, the district court erred when it held that the Bowens did not challenge the Memorandum of Sale under Idaho Code § 55-707. Further, the district court held that evidence to rebut the presumption that the notary acted in

compliance with Idaho Code § 55-707 was lacking. R. p. 120 L. 11 – 14. The evidence regarding whether or not the notary acted in compliance with Idaho Code § 55-707 is contained on the face of the Memorandum of Sale. *See generally* R. p. 85. The document contains only a notary’s stamp without a certificate of acknowledgment at all (*Id.*). Further, the Bowens made a more specific challenge under “chapter 7, title 55, Idaho Code . . . .” by challenging the Memorandum of Sale’s compliance with the required form of the certificate of acknowledgement pursuant to Idaho Code §§ 55-709 through 55-715. R. p. 104 L. 4 – p. 109 L. 2. Thus, the district court erred when it held that evidence to rebut the presumption of the notary’s compliance was lacking.

**a. Salladay’s Memorandum of Sale is not an instrument entitled to be recorded.**

Salladay’s Memorandum of Sale appears to be an attempt to summarize a conveyance of real property pursuant to Idaho Code § 55-813; however, the document fails to satisfy both the requirements to convey real property and the requirements of recording a summary instrument. Idaho law defines a conveyance as: “[E]very instrument in writing by which any estate or interest in real property is created, alienated, mortgaged or encumbered, or by which title to any real property may be affected, except wills.” Idaho Code § 55-813 (bolded emphasis added). “The general requirements for a conveyance of real property are outlined in the Idaho Code, which provides: ‘A conveyance of an estate in real property may be made by an instrument in writing, subscribed by the party disposing of the same, or by his agent thereunto authorized by writing. The name of the grantee and his complete mailing address must appear on such instrument.’ Idaho Code § 55-601. *See also Chavez v. Barrus*, 146 Idaho 212, 192 P.3d 1036, 1044 (*Idaho* 2008) (endorsing this general rule).” *Hopkins v. Thomason Farms, Inc. (In re Thomason)*, 2009 Bankr. LEXIS 1769 at \*11 (Bankr. D. Idaho June 24, 2009) (quoting Idaho Code § 55-601) (bolded emphasis added).

In the above-cited *Hopkins* case, a key issue was whether or not a recorded mortgage was legally deficient, and therefore invalid. *Hopkins* at \*10. The *Hopkins* Court found that the document at issue satisfied “the first requirement that the instrument be subscribed by the mortgagor or his agent.” *Id.* at \*11. The court then reasoned and held as follows: “However, the latter requirement under the statute is not satisfied. Although each of the Thomasons also signed the document, they did not include their complete mailing addresses on the instrument, nor did they incorporate them by reference to some other document. As such, this

mortgage instrument fails to comply with the requirements under Idaho law and is therefore invalid.” *Id.* at \*11, \*12 (emphasis added).

The *Hopkins* Court also found that the mortgage document was a contract that lacked “several essential terms.” *Id.* at \*12. The amount of debt was not identified and, except for a statement that the debt was “due and owing,” there were no repayment terms. *Id.* “Because a mortgage is subject to the statute of frauds, gaps in essential terms cannot be filled by parol evidence.” *Hopkins* at \*12 (citing *Lawrence v. Jones*, 124 Idaho 748, 864 P.2d 194, 197 (Idaho Ct. App. 1993)). The court found that the document was fatally imprecise and vague and resulted in the court holding that the mortgage was both invalid and unenforceable – the Thomason’s were not entitled to receive a distribution from the proceeds of the subject property’s sale. *Id.*

While *Hopkins* is not relevant to the case at bar regarding the enforceability of the alleged conveyance between Salladay and Stroud, *Hopkins* is on point in regards to the process of determining the validity of a purported real property conveyance instrument **before determining** what effect, if any, the document has. The same procedural analysis should apply to the Memorandum of Sale in the case at bar. Pursuant to the holding in the *Hopkins* case, if the Memorandum of Sale is fatally defective, it is invalid.

Like the document at issue in *Hopkins*, the Memorandum of Sale in the case at bar is in writing. Salladay’s signature appears as “Personal Representative of the Estate of Roger John Troutner.” R. p. 85 (Memorandum of Sale, Canyon County instrument number 2012004992, filed as Exhibit B to the Affidavit of William J. O’Connor in Support of Motion to Reconsider, filed June 9, 2015). The Memorandum of Sale was stipulated as evidence during the May 14, 2015 hearing. Tr. P. 79 L. 1 – 15. And also like the document in *Hopkins*, **the Memorandum of Sale does not contain a mailing address** for the Troutner Estate, nor does the document incorporate a mailing address by reference to some other document. *Hopkins* at \*12, (emphasis added). Based upon those facts alone, this Court should find the Memorandum of Sale to be fatally defective, and therefore, invalid.

But there is more evidence in the case at bar than in the *Hopkins* case that should mandate such a holding. Similar to the document at issue in *Hopkins*, the Memorandum of Sale contains no sale amount, and no amount of outstanding debt or a payment schedule is identified. *Id.* To be consistent with the holding in *Hopkins*, this Court should hold that the Memorandum

of Sale fails to meet the requirements of a conveyance pursuant to Idaho Code § 55-601; and therefore, it is fatally defective and invalid. And because said Memorandum of Sale is fatally defective and invalid, it was not entitled to be recorded, it did not provide constructive notice to anyone, including CILD, of its contents, and it is void against a subsequent purchaser in good faith who pays a valuable consideration for the same property. The Bowens' tax deed was recorded on December 19, 2014. R. p. 84. The Bowens are subsequent purchasers in good faith and for value, so the Memorandum of Sale, pursuant to Idaho Code § 55-812, is void against the Bowens' recorded tax deed.

**b. Salladay's Memorandum of Sale is not a legally valid summary instrument.**

The Memorandum of Sale fails to meet the requirements of recording a summary instrument pursuant to Idaho Code § 55-818. "A summary of the instrument shall be signed and acknowledged by all parties to the original instrument. The summary of the instrument shall clearly state: the names of the parties to the original instrument, the complete mailing address of the grantee, the title and date of the instrument, a description of the interest or interests in real property created by the instrument, and the legal description of the property." *Id.* While the Memorandum of Sale states the address and legal description of the property that "has been sold," it fails to specify the mailing address of the purchaser. It is not signed and acknowledged by all parties to the original instrument, because neither the signature of Kelly Joe Stroud nor the acknowledgment thereof appears on the Memorandum of Sale. Neither does the Memorandum of Sale specify whom the seller or grantee is; nor does it describe the interest or interests in real property created by the purported instrument.

Further, not only does the document fail to specify the date and title of the instrument, but the Memorandum of Sale does not state whether or not such a separate instrument regarding the sale exists. The document refers to a "Contract of Sale" (R. p. 85 L. 4), which one might assume is in writing, but there is no evidence regarding whether or not the Contract of Sale is a written document. *See generally* R. Because the *Hopkins* Court held a mortgage to be invalid for failure to provide the complete mailing address of the grantor, this Court should hold that the Memorandum of Sale, which fails to provide not only essential elements but also any reference to whether or not there was a separate instrument that the Memorandum of Sale was purported to summarize, is fatally defective; and therefore, it is invalid. Thus, the Memorandum of Sale was not entitled to be recorded, so Salladay was not entitled to receive notice of the tax-deed sale.

the unrecorded prior alleged conveyance void against the Bowens pursuant to Idaho Code § 55-812.

**c. In summary, Salladay's Memorandum of Sale is void against the Bowens pursuant to Idaho Code § 55-812.**

The preceding analysis proves that Salladay failed to properly record a conveyance or other document that would have entitled him to receive notice of the pending tax-deed sale. The Memorandum of Sale complies with neither the requirements of recording a conveyance nor the requirements of recording a summary instrument based upon an original instrument. The record contains no evidence that any document regarding the purchase and sale transaction between Stroud and Salladay, except for the Memorandum of Sale, was recorded. *See generally* R. The tax deed granted to the Bowens was recorded on December 19, 2014. R. p. 60 (Exhibit 4 to the Affidavit of G. Lance Salladay, filed May 8, 2015). As a necessary result and pursuant to Idaho Code § 55-812, any unrecorded prior conveyance of the disputed property is void as against the Bowens, subsequent purchasers of the same property in good faith and for a valuable consideration, because their conveyance was first duly recorded. Therefore, this Court should reverse the district court and hold that the Memorandum of Sale and any and all unrecorded instruments that the Memorandum of Sale may have attempted to summarize are void as against the Bowens' recorded tax deed.

**B. The district court erred when it held that even if the Memorandum of Sale was not properly recorded, that CILD was required to provide notice of the pending tax-deed sale to Salladay.**

The preceding analysis proves that the Memorandum of Sale was not properly acknowledged and it was not entitled to be recorded. Thus, Salladay was not entitled to receive notice of any of the proceedings regarding the delinquent assessments and the tax-deed sale. While the district court held that CILD failed to locate the Memorandum of Sale, resulting in Salladay not receiving notice of the sale (R. p. 113 L. 23 – p. 114 L. 1 – 3), there is simply no evidence in the record to support that finding. *See generally* R. The record does not contain an affidavit from CILD or any of its employees regarding actions taken or not taken regarding the Memorandum of Sale. *See generally* R. While Salladay attempted to submit as evidence a letter from CILD's lawyer to the Bowens' previous lawyer, which does not allege that CILD failed to locate the Memorandum of Sale (*See* R. pp. 51, 52), the Bowens' filed an Objection and Motion



to Strike said document as inadmissible hearsay that also contains settlement discussions in violation of I.R.E. 408. R. p. 69. The parties argued the objection and motion to strike at the May 14, 2015 hearing. Tr. p. L. 6 – p. 28 L. 16. The district court’s opinion neither ruled on nor discussed the objection and motion to strike that was argued at the May 14, 2015 hearing. *See generally* R. pp. 71 – 80.

The Bowens hereby renew their Objection and Motion to Strike. If this Court holds that Salladay was not entitled to receive notice of the pending tax-deed sale, then the issue will likely be irrelevant. However, if this Court does not make such a holding, then the Bowens ask this Court to rule on whether Paragraph 6 of the Salladay Affidavit and its Exhibit A should be struck based upon the record already before this Court.

- 1. Salladay’s Memorandum of Sale refers to the subject property’s sale as taking place in present perfect tense – a present statement referring to a past event – so the document’s plain language should have resulted in Stroud receiving notice, but not Salladay.**

In relevant parts, the Memorandum of Sale states as follows: “**There has been sold**, subject to all easements and restrictions of record and compliance with the terms of the Contract of Sale, the following property, described as a single family residence.” (Bolded emphasis added). “There has been sold” is present perfect tense – a tense used to refer to a past event without a specified time frame. The word “has” is present tense, but the verb “been sold” is past tense. It is a present statement referring to a past event. While language follows the present perfect tense that denotes conditions pursuant to which the property was sold under, taken in context, those words refer to the prior event – the sale – that already had taken place at the time when the Memorandum of Sale was recorded.

The Memorandum of Sale further states that Stroud was the purchaser. R. p. 48, 84. The plain meaning of the words, in the tense that Salladay used, leads to the conclusion that the Memorandum of Sale refers to a sale that took place some time before the instrument was recorded. Therefore, Salladay, by recording said memorandum, estopped himself from being entitled to receive notice as a record owner.

- 2. Salladay’s Memorandum of Sale may contain ambiguities that cannot be cured by reference to the instrument itself, because no such instrument was recorded.**

Another fatal flaw of the Memorandum of Sale is that additional ambiguities lie within the subject-matter content that the document refers to. The plain language of the document refers to a past sale and fails to clarify the essential terms of the alleged contract. Because the Memorandum of Sale's failure to provide essential terms cannot be cured by referencing any instrument that the document may refer to, it fails to provide constructive notice to anyone. Based upon the foregoing facts, law, and analysis, the Bowens respectfully ask this Court to reverse the district court and remand with instructions to dismiss Salladay's petition.

Salladay alleged that the Memorandum of Sale is "subject to . . . compliance with the terms of the Contract of Sale . . ." and "vesting" of the sale, which he alleges is a condition precedent. R. p. 95 L. 30 – p. 96 L. 4. Salladay's interpretation of the Memorandum of Sale – in spite of the document's own language stating that the property "has been sold" – is further evidence that the document is imprecise and vague. To understand what the document attempts to encapsulate, one must refer to the instrument itself. As previously cited in this brief, in the event that the certificate of acknowledgment is defective, the "deficiency can be cured by reference to the instrument itself." *Farm Bureau, supra*, at 751, 605 P.2d at 515. But because Salladay failed to record the instrument itself, there is not a cure for interpreting the Memorandum of Sale. Because this issue has already been analyzed in detail in this brief, the Bowens refer to the law, analysis, and arguments previously analyzed and argued in this brief.

**C. The district court erred when it remanded the case to the CILD Board because Idaho Code § 43-719 applies only while a tax deed is "pending issuance."**

In its Order Denying Motion for Reconsideration, the district court reasoned that Idaho Code § 43-719 provides a statutory remedy for Salladay. R. p. 122 L. 12 – p. 123 L. 2. The district court's first written decision in this action, Order to Remand to Board for Determination of Validity of Tax Deed, specifically stated as follows: "Idaho Code section 43-719(4) allows any party 'aggrieved by the final decision of the board concerning the issuance of a tax deed . . . ' to seek judicial review." R. p. 78 L. 1, 2. But when taken as a whole and analyzed in context, Idaho Code § 43-719 provides a chronological step-by-step remedy that begins only while a tax deed is "pending issuance" and not at any time thereafter. Because the O&M deed regarding the subject property was issued on July 14, 2014 (*See generally* R. pp. 55 – 57), and the Bowens' tax deed was issued on December 19, 2014 (R. p. 84), there was not a tax deed that was pending issuance at the time of the district court's decision. Thus, the statute is inapplicable as a remedy,

because CILD no longer had statutory authority to make decisions regarding the already-issued tax deed.

Idaho Code § 43-719(1) provides, in relevant part, as follows: “When a record owner or owners or any party in interest upon whom a notice of **pending issuance of tax deed** is served . . . fails to appear or otherwise defend and answer at the time set for hearing in such notice and it is made to appear to the board that the owner of the tax certificate or treasurer has fulfilled the requirements of sections 43-717 and 43-718, *Idaho Code*, **the board shall**, without further notice to the record owner or owners . . . **immediately direct that the treasurer shall issue a tax deed** in favor of the district or the owner of the tax certificate, as the case may be. (Bolded emphasis added). The plain meaning of subsection one of the statute exclusively applies to a time frame before a tax deed is issued; and more specifically, it applies to “the time set for hearing in such notice.” Additionally, the record lacks any evidence that CILD’s treasurer failed to fulfill the requirements of Idaho Code §§ 43-717 and 43-718. *See generally* R.

When applied to Idaho Code § 43-719(1)’s chronological step-by-step process, the fact that CILD already issued the duly acknowledged tax deed “is prima facie evidence of the regularity of all other proceedings for the assessment, inclusive, up to the execution of the deed.” Idaho Code § 43-720(7). Further, “[t]he deed conveys to [the Bowens] the absolute title to the lands described therein, free of all encumbrances except mortgages of record to the holders of which notice has not been sent in this chapter provided . . .” *Id.* Said exception does not include Salladay, because Salladay is not a holder of a mortgage of record. *See generally* R.

Idaho Code § 43-719(2) applies only when a tax deed has not been issued. In relevant part, the statute states as follows: “When a record owner or owners or any party in interest upon whom such notice is served . . . appears or answers **at the date specified in such notice**, the board shall consider documentary evidence and hear testimony and make a final decision in writing.” (Bolded emphasis added). The words “such notice” refer to the “notice of pending issuance of tax deed” in Idaho Code § 43-719(1). In the case at bar, the tax deed is not pending issuance – it was already issued – and therefore; Idaho Code § 43-719(2)’s notice, being the same notice described in Idaho Code § 43-719(1), cannot provide a remedy because the tax deed is not pending issuance and the time and place set for hearing in such notice has passed.

Further Idaho Code § 43-719(1) mandates that the board shall immediately direct the treasurer to issue a tax deed in the event that two things happen: 1) an owner or party in interest

“fails to appear or otherwise defend and answer **at the time set for hearing in such notice,**” and upon that failure to appear or otherwise defend, 2) “it is made to appear to the board that the owner of the tax certificate or the treasurer has fulfilled the requirements of *43-717 and 43-718, Idaho Code.*” (Bolded emphasis added). Because the effect of a duly acknowledged tax deed “is prima facie evidence of the regularity of all other proceedings for the assessment, inclusive, up to the execution of the deed,” and because the statute contemplates no further proceedings by the board after the tax deed has been issued, the deed’s issuance ended CILD’s proceedings regarding the previously unpaid assessments; and CILD cannot take action in further proceedings regarding the issuance of the Bowens’ tax deed. *See generally* Idaho Code §§ 43-719 and 43-720.

Continuing to analyze Idaho Code § 43-719(2), in light of the effect of the deed as provided in Idaho Code § 43-720, shows that it is the next procedural step applicable only when an owner or party in interest “appears or answers at the date specified in such notice” (of pending issuance of the tax deed). The appearance of a party to defend and to attempt to prevent the deed’s issuance is the triggering event that can lead to a final decision of the board. Similar to when a party fails to defend a lawsuit and the plaintiff becomes the prevailing party by default, failure to appear before the board or otherwise defend the pending tax-deed issuance results in waiver of a party’s right to present evidence and challenge the evidence before the board. Even if a party appears and defends, the board shall immediately direct the treasurer to issue a tax deed if the board finds that the treasurer conformed to the requirements of *43-717 and 43-718, Idaho Code*, and that a delinquent assessment was owing on the property described in the notice and that such delinquency has not been paid. *See* Idaho Code § 43-719(2). While a final decision of the board may be reviewed by the district court, failing to appear or otherwise defend the pending issuance of the deed results in not having a final decision from the board for judicial review. Just as a party who fails to appear in court waives its right to provide evidence and challenge the evidence of its opponent before a neutral finder of fact, a party who fails to appear before the board does the same. The result in each case is that a record is established, albeit one with one-sided evidence.

As Idaho Code § 43-719 continues, each subsection builds upon the previous. Subsection three refers to subsection two’s proceeding, whether a contested proceeding took place or not. In the event that a party appeared to challenge the tax deed’s issuance and that party was aggrieved

by the board's final decision, Idaho Code § 43-719(4) provides for judicial review of the final decision. Just as a party that defaults in a civil court case will not have any evidence for an appellate court to review, a non-appearing or non-defending party here may ask the district court to review the board's final decision – without there being a final decision to review. As a necessary result, Idaho Code § 43-719(4) does not provide a true remedy to Salladay in the case at bar. The chronological processes described in Idaho Code § 43-719 end upon the issuance of a tax deed by default, or they begin when a party appears to defend at the time and place provided in the notice of pending issuance of a tax deed. The latter did not occur and the former ended the remedial processes provided for in Idaho Code §§ 43-719(2) and 43-719(4). Thus, the district court did not have statutory authority to remand this case to the CILD Board.

**D. Salladay's petition was filed untimely.**

Further, even if the analysis regarding Idaho Code § 43-719 can be analyzed in a different way leading to a different conclusion, Salladay's petition fails for lack of timeliness. Idaho Code § 43-719(4) provides that a petition for judicial review of a tax deed's issuance be filed with the court "within thirty (30) days after receipt of the final decision of the board." CILD issued an O&M deed to itself on July 14, 2014. *See generally* R. pp. 55 – 57. At that point in time, CILD had already gone through the process described in Idaho Code § 43-719. Without having a tax certificate or a deed for the subject property already, CILD could not have granted the deed to the Bowens on December 19, 2014. Salladay's petition was not filed until January 5, 2015. R. p. 2 L. 13, p. 5. More than 30 days elapsed between July 14, 2014 and January 5, 2015. Therefore, Salladay's petition for judicial review is untimely.

**E. Even if Salladay is a party in interest under Idaho Law, Salladay received actual knowledge of the pending issuance of the tax deed pursuant to Idaho Code 43-717(6).**

Salladay alleges that he did not receive notice of the pending issuance of the tax deed. R. p. 24 L. 12 – 14, 21, 22. Salladay further alleges that: "There is no dispute about the fact that the Plaintiff, a party in interest and of record, did not receive any notice of the pending issuance of the tax deed." R. p. 39 L. 4 – 7. A closer look at Idaho Code § 43-717(6), however, shows that there is a dispute because Salladay received sufficient notice of the pending issuance of the tax deed.

Idaho Code § 43-717(6) states as follows: "If a record owner **or** owners **or** a party in interest shall have actual knowledge of the notice of pending issuance of a tax deed **or** that

issuance of a tax deed is pending, it shall be deemed sufficient notice under this section.” (Bolded emphasis added). The word “or” precedes each type of party or parties that are listed. The statute does not state: “it shall be deemed sufficient notice required in this section as to that party.” *See generally* Idaho Code § 43-717(6). Instead, the statute states: “it shall be deemed **sufficient notice under this section.**” (Bolded emphasis added). Those words are broad and inclusive as opposed to narrow. Thus, the plain language of the statute provides that actual knowledge to one party is sufficient to provide actual notice to all.

Idaho Law presumes that a public officer did his duty and complied with the law upon executing an affidavit of compliance. *See Shail v. Croxford*, 54 Idaho 408, 415, 32 P.2d 777, 779 (S. Ct. 1934); *see also Sims v. Milwaukee Land Co.*, 20 Idaho 513, 119 P. 37; *Harper v. City of Conway Springs*; and Idaho Code § 43-720(7). CILD’s treasurer, who executed an affidavit pursuant to Idaho Code § 43-718, is a public officer. It is further presumed that: “All statutes pertaining to revenue are to be construed most strictly in favor of the object of the statute; that is in favor of the purpose of the statute.” *Salisbury v. Lane*, 7 Idaho 370, 63 P. 383.

The object of Idaho Code § 43-700 et seq. is to ensure that tax revenue is collected for irrigation districts while providing a fair and reasonable method to collect tax revenue for properties that have been delinquent for three or more years. It is logical that actual knowledge, which is a higher degree of notice than constructive notice, may impute notice to other parties in privity of contract with the party having actual notice. It is especially logical in the case at bar, where the Memorandum of Sale provided the address of the property that had been sold and not any other. *See* R. p. 85. Stroud received notice of the delinquent assessments and the pending tax-deed sale. R. p. 114 L. 3, 4. If Stroud and Salladay had an unrecorded agreement that provided for Salladay to pay the tax bills, then Stroud should have contacted Salladay after receiving the tax bills, notices of the delinquent assessments, and certainly Stroud should have contacted Salladay after receiving notice of the pending tax-deed sale. To expect a taxing entity, such as CILD, to somehow locate another person or entity that CILD had no idea was supposed to pay the tax assessments, if that is what happened, is unreasonable, given that CILD was provided with only the address of the subject property.

A property owner has an obligation to pay taxes on that property – it is not something outside of the usually-expected knowledge of a property owner or other entity with an interest in the property. It is unreasonable to record a one-page document that does not contain any

information regarding where to send tax bills and contains only an address for the subject property, and then expect to receive tax assessment notices regarding that property at another address. Regardless, Idaho Code § 43-717(6) imputed knowledge to Salladay via actual notice to Stroud. Thus, even if Salladay had properly recorded an instrument and did not receive an actual letter of notice, he had knowledge of the tax-deed sale pursuant to statute.

**F. The district court erred when it found that the Bowens obtained a windfall.**

The district court found that the Bowens obtained a windfall and that Salladay lost an asset worth significantly more than \$951.00. R. p. 116 L. 4 – 7. The record, however, contains no evidence of the subject property's value. *See generally* R. Without having a value for the subject property, it is impossible to determine whether or not Salladay lost an asset worth significantly more than \$951.00. Without having a value for the subject property, it is impossible to determine whether or not the Bowens have obtained a windfall. As a result, this Court should vacate those findings by the district court because the record contains no evidence to support said findings.

**G. The Bowens are entitled to be awarded their attorneys' fees and costs.**

Idaho Code § 43-719(5) provides as follows: "All costs and fees of any hearing or proceeding shall be awarded to the prevailing party; provided however, the costs and fees shall not be ordered paid by and district or its officials in absence of a showing of gross negligence, gross nonfeasance, or gross malfeasance by the district or its officers and a showing of substantial and definite injury to the petitioning party." This action was brought by Salladay, who failed to properly record a document that provided constructive notice to anyone of its contents. Any interest that Salladay had in the property is void against the Bowens pursuant to Idaho Code § 55-812. Even if Salladay had properly recorded the Memorandum of Sale, that document failed to provide CILD with any address, except for the address of the subject property, to which tax assessments and notices of delinquency should have been sent. Salladay's failure to properly record a valid instrument or other document providing constructive notice to anyone that he had an interest in the property may have led to the tax sale. After failing to comply with Idaho law when he recorded the Memorandum of Sale, and after Stroud failed to contact Salladay regarding the tax assessments, delinquencies, and the pending tax-deed sale, Salladay brought this lawsuit against the Bowens, who had every right to presume that CILD complied with the law in the proceedings leading up to the issuance of the tax deed. The

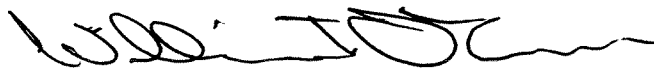
Bowens have now incurred substantial legal fees and costs in defending against Salladay's lawsuit, including bringing this appeal. Not only does Idaho Code § 43-719(5) provide that the Bowens "shall be awarded" "all costs and fees" incurred in this action, but justice requires it as well. The Bowens respectfully ask this Court to reverse the district court and award them their attorneys' fees and costs both in this appeal and in the underlying action.

## VI. CONCLUSION

The Memorandum of Sale was not properly acknowledged; and therefore, it was not properly recorded. Because the Memorandum of Sale was not properly recorded, it imparted constructive notice to no one and CILD was not required to provide notice of the pending tax-deed sale to Salladay. Further, because Salladay failed to record a legally valid instrument, his Memorandum of Sale is void against the Bowens pursuant to Idaho Code § 55-812. Salladay's petition to the district court was untimely. In addition, the plain language of Idaho Code § 43-717(6) imputes Stroud's actual knowledge to Salladay. Based upon the foregoing law, authority, and analysis, the Bowens respectfully asks this Court to reverse the district court and find that Salladay's petition must be dismissed based upon one or more of the reasons argued in this brief. The Bowens further ask this Court to award them their attorneys fees' and costs both in the underlying action and in this appeal.

Respectfully submitted this 21<sup>st</sup> day of March 2016.

O'CONNOR LAW, PLLC



William J. O'Connor  
Attorney for Eric & Kathryn Bowen



CERTIFICATE OF SERVICE

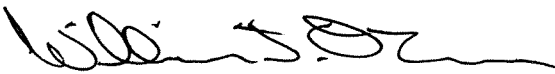
I HEREBY CERTIFY That on the 21<sup>st</sup> day of March 2016, I caused to be served a true and correct copy of the foregoing document by the method indicated below, and addressed to the following:

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